Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

No. 99-45

In The

Supreme Court of the United States

HANS WEEREN dba VENTURA MARINA and LANDING,

Petitioner,

vs.

VENTURA GROUP, LLC; JOHN SCOTT; CHANNEL HARBORS, INC.; STEARNS WHARF/PACIFIC HARBORS LTD; AND MICHAEL S. KOGAN, Chapter 7 Trustee,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JULIAN BACH
Counsel of Record
ARTER & HADDEN, LLP
725 S. Figueroa Street, 34th Floor
Los Angeles, California 90017
Telephone: (213) 430-3300
Facsimile: (213) 617-9255

Counsel for Respondent, Michael S. Kogan, Chapter 7 Trustee

RICHARD I. WIDEMAN
Attorney at Law
27 El Paseo
Santa Barbara, California 93101
Telephone: (805) 884-9521
Facsimile: (805) 884-9531

Counsel for Respondents Ventura Group, LLC; John Scott; Channel Harbors, Inc.; and StearnsWharf/Pacific Harbors Ltd.

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The issue presented is whether the appeal by a Chapter 7 Debtor of an order approving the Chapter 7 Trustee's compromise agreement to sell assets of the estate should be dismissed as moot if the Chapter 7 Debtor fails to obtain a stay of the order pending appeal. Debtor asserts that his right to appeal survived the Trustee's settlement. 11 U.S.C. § 363(m), which codifies in part the bankruptcy mootness rule, provides that the reversal or modification on appeal of an order authorizing the sale or lease of property of a bankruptcy estate does not affect the validity of the sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

LIST OF INTERESTED PARTIES

The parties to the proceedings below were Petitioner, Hans Weeren dba Ventura Marina and Landing, Debtor in the Chapter 7 proceedings below.

Respondent Michael S. Kogan is the Chapter 7 Trustee for the bankruptcy estate of Hans Weeren dba Ventura Marina and Landing. Additional Respondents are VENTURA GROUP, LLC; JOHN SCOTT; CHANNEL HARBORS, INC.; STEARNS WHARF/PACIFIC HARBORS LTD, the adverse parties in proceedings below.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Michael S. Kogan, the Chapter 7 Trustee, Ventura Group LLC, John Scott, Channel Harbors, Inc., and Stearns Wharf/Pacific Harbors LTD respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Order of the Court of Appeals for the Ninth Circuit, filed on April 1, 1999, dismissing the subject appeals as moot.

STATEMENT OF THE CASE

This matter involves consolidated appeals arising out of the Bankruptcy Court's Orders (1) Denying the Debtor-In-Possession's Motion to Assume Sub Lease (*Ninth Circuit Appeal No. 99-55086*), and (2) Approving the Compromise of a Controversy between Michael S. Kogan, the Chapter 7 Trustee of the bankruptcy estate of Hans Weeren dba Ventura Marina (the "Trustee"/"Respondent") and Ventura Group, LLC, John Scott, Channel Harbors, Inc. and Sterns Wharf/Pacific Harbors, Ltd. (the "Ventura Group") (*Ninth Circuit Appeal No. 99-55090*).

Petitioner Hans Weeren dba Ventura Marina and Landing (hereinafter "Petitioner") was the sub-lessee of a marina premises located at 1560 Anchors Way, Ventura, California 93001 ("subleased property") from D.L.K., Inc., a California Corporation, for a term running for 24 years and 10 months, commencing on April 1, 1988. Ventura Group LLC subsequently became the master tenant from D.L.K., Inc. as successor from parties identified as John Scott, Stearns Wharf/Pacific Harbors, Ltd. and Channel

Harbors, Inc. (hereinafter the "Ventura Group"). The subleased property was composed of boat slips which were rented out by Petitioner.

Some time after 1993, Petitioner was sued by another sub-tenant in the marina, Chan J. Choi, in Ventura County Superior Court, Case No. CIV 153849 (the "Choi litigation") for breach of contract. Petitioner cross-complained against the Ventura Group in the Choi litigation for alleged failures to perform obligations under the original sublease between Petitioner and D.L.K., Inc., including breach of lease, interference with economic relations and specific performance of the lease.

At some point, Petitioner defaulted under the terms of his sub-lease by, among other things, becoming delinquent in percentage rent, failing to produce the requisite audited accounting statements, and by asserting offsets against rent for such items as utilities, his own boat slip and certain office related expenses – none of which were authorized under the terms of the sublease. Due to these defaults, on or about October 22, 1996, Ventura Group commenced eviction proceedings against Petitioner. On November 8, 1996, or on the eve of the trial in the Choi litigation, Petitioner filed for relief under Chapter 11 of the United States Bankruptcy Code.

On or about January 7, 1997, Petitioner filed a Motion to Assume the sublease between Petitioner and the Ventura Group, with the hearing on the Motion originally set for February 5, 1997 and continued for an evidentiary hearing on February 18, 1997. At the continued hearing, Petitioner did not appear and his Counsel was not

"ready". The Ventura Group opposed the lease assumption, and argued that Petitioner had not established his ability to perform under the sublease. The Bankruptcy Court found that Petitioner was in default under the sublease, but granted Petitioner a continuance to present evidence of his ability to perform, on condition that he deposit $40,000.00 into a trust account and pay sanctions of $2,180.00 on or before the close of business on February 28, 1997. The order further provided that in the event the Petitioner failed to pay the monies by that date, the Ventura Group could submit a Declaration and Order denying Appellant's Motion to Assume the Sublease.[1]

Petitioner failed to timely tender the $40,000.00 and pay the sanctions, and on March 3, 1997, the Court entered an Order Denying the Motion To Assume Sublease. Since that time, the Ventura Group has invested money in the repair of the marina as well as entered into new sub-leases with new tenants.

On or about March 6, 1997, Petitioner appealed the Court's Order Denying the Motion to Assume to the Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP"), BAP Appeal No. CC 97-1169 ("BAP Appeal No. 1").

In late July 1997, on Motion by the Office of the United States Trustee based upon Petitioner's failure to comply with various filing requirements and for Petitioner's failure to file a Disclosure Statement and Plan of Reorganization, the bankruptcy case was converted to a Chapter 7 proceeding. Respondent Michael S. Kogan was

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[1] It should be noted that Petitioner never objected to any of the conditions ordered by the Court at the evidentiary hearing.

and is the duly appointed and acting Chapter 7 Trustee as of August 5, 1997.

In December 1997, Respondent and the Ventura Group negotiated and entered into a Settlement Agreement, whereby for the sum of $27,500.00, the Trustee agreed to settle all controversies between the estate and the Ventura Group *relating to the sublease*. This included BAP Appeal No. 1, and the cross-complaint filed by Appellant in the Choi litigation. The Compromise was approved by the Court by Order dated February 13, 1998, and the Ventura Group paid the $27,500.00 to the Trustee. Petitioner likewise appealed the Order Approving the Compromise to the BAP, BAP Appeal No. 1154 ("BAP Appeal No. 2").

Petitioner failed to request a stay pending the appeal for either BAP Appeal No. 1 or BAP Appeal No. 2. After consolidation of the appeals, and after oral argument on the consolidated appeals and motion of the Ventura Group, the appeals were dismissed by the BAP as moot by Memorandum filed on October 29, 1998.

Petitioner thereafter appealed the final order from the BAP to the Ninth Circuit Court of Appeals. The appeals were likewise dismissed as moot by the Ninth Circuit Court of Appeals by an Order filed on April 1, 1999.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING FACTORS PRESENT IN THIS CASE FOR WHICH THE COURT SHOULD GRANT CERTIORARI.

Generally, there is only a limited basis upon which the Supreme Court will grant certiorari. This includes a need to resolve intercircuit conflicts, if the intercircuit split threatens the consistency of federal law (See, e.g., *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 661, 113 S.Ct. 1732, 1736, 91 L.Ed.2d 202 (1993)); if the case involves vital constitutional issues that are necessary to a decision of the case (See, e.g., *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 1642, 137 L.Ed.2d 945 (1997)); if the case involves significant issues of public policy (See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585, 113 S.Ct. 2786, 2792, 125 L.Ed.2d 469 (1993)); or if the case involves an interpretation of federal statutes (See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993)). Respondent asserts that the issue raised by Petitioner falls into none of these categories.

In this case, the Ninth Circuit dismissed the consolidated appeals because the bankruptcy code authorizes the Chapter 7 Trustee to dispose of property of the bankruptcy estate through settlement, because the Bankruptcy Court approved the settlement, and because the Petitioner failed to seek and/or obtain a stay of the order approving the settlement. The law is well settled in the Ninth Circuit, along with an overwhelming majority of the circuits, that when an Order authorizes the disposition of property of

the estate, and an appellant fails to obtain a stay from an Order that permits the sale of the debtor's assets, the Appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale. *In re Vista Del Mar Assoc., Inc.*, 181 B.R. 422, 424 (9th Cir. BAP 1995).[2] The Ninth Circuit in *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172-73 (9th Cir. 1988) stated "[w]hether an order directly approves the sale or simply lifts the automatic stay, the mootness rule dictates that the appellant's failure to obtain a stay moots the appeal." *Id.* at 1171; see, also, *In re Ewell*, 958 F.2d 276, 280 (9th Cir. 1992). These cases focus upon the need for finality of bankruptcy court orders.

This bankruptcy mootness rule is codified, in part, in 11 U.S.C. § 363(m), which provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

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[2] Other circuits that follow the Ninth Circuit include the First Circuit (*In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990)), the Second Circuit (*United States v. Salerno*, 932 F.2d 117 (2nd Cir. 1991)), the Fifth Circuit (*In re Gilchrist*, 891 F.2d 559 (5th Cir. 1990)), the Seventh Circuit (*In re Sax*, 796 F.2d 994 (7th Cir. 1986)), and the Eleventh Circuit (*In re The Charter Co.*, 829 F.2d 1054 (11th Cir. 1987).

In this case, Petitioner not only failed to obtain a stay pending appeal, Petitioner failed to even try to obtain a stay.

Respondent acknowledges that the Third Circuit Court of Appeals has held that in addition to looking at an appellant's failure to obtain a stay of a sale order, it will further 'consider the remedies requested by the appellant to ascertain whether a remedy can be fashioned that will not affect the validity of the sale. *In re Krebs Chrysler-Plymouth, Inc.* 141 F.3d 490 (3rd Cir. 1998).[3] That rule does not differ from the majority of the circuits so as to "threaten the consistency of federal law." In fact, the Ninth Circuit has shown a willingness to examine other possible remedies. (See, e.g., *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987)). As such, there is no real "conflict" between the circuits making certiorari necessary on this issue.

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[3] The record in this instant appeal shows that the Bankruptcy Court considered alternative proposals made by the Debtor in opposition to the Trustee's settlement agreement, and found that the Debtor's arguments/proposals were unsubstantiated by evidence. (See BAP Memorandum, page A-8).

II.

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY DISMISSED THESE APPEALS AS MOOT BASED UPON THE PETITIONER'S FAILURE TO OBTAIN A STAY OF THE ORDER APPROVING THE TRUSTEE'S COMPROMISE WITH THE VENTURA GROUP.

The Bankruptcy Appellate Panel for the Ninth Circuit, as affirmed by the Ninth Circuit Court of Appeals, dismissed the instant appeals as moot because Petitioner failed to either seek or obtain a stay of the order approving the Trustee's Compromise with Respondent the Ventura Group.

In the Memorandum issued by the BAP, as affirmed by the Ninth Circuit, the BAP concluded that the two Appeals were, and are moot, as follows:

> "The debtor failed to obtain a stay pending appeal of the Settlement Agreement which proposed to dismiss the debtor's first Appeal as well as settle the Choi litigation. As a result of debtor's failure to obtain a stay, the Marina property has been returned to the Ventura Group which has invested money in repairing and re-leasing the Marina to third parties. As the rights of third parties have intervened, we DISMISS THE PRESENT APPEALS AS MOOT."[4]

Petitioner has apparently mis-read the BAP decision by focusing not on the Order Approving the Compromise between the Trustee and the Ventura Group, but rather,

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[4] See BAP Memorandum, page A-13, attached to the Petition For Writ.

on the Order Denying the Debtor's Motion to Assume the Sublease. Specifically, the gravamen of Petitioner's Petition For Writ is as follows:

> The limitation of [11 U.S.C. § 363(m)] does not apply to the facts of this case. Ventura Group obtained possession by an order denying the assumption of the sublease and operation of 11 U.S.C. § 365(d)(4), which required immediate surrender of the property. There have been no cases discovered that applies bankruptcy's mootness rule to the facts of this case, and the Court of Appeals must have assumed that the turnover of subleased property pursuant to 11 U.S.C. 365(d)(4) was analogous to a sale of property under 11 U.S.C. § 363. Accepting that assumption for argument, those cases that do not follow the per se rule are instructive.

Simply stated, this was not the focus of the BAP or the Ninth Circuit Court of Appeals.

Nor did the Court of Appeals make a summary determination, with no inquiry into whether or not any relief could be had by the Debtor, as asserted by the Petitioner. Specifically, Petitioner states:

> The evidence before the Court failed to reveal any details from which the BAP could conclude any change in circumstances or effects on third parties not before the Court.

This is simply not true. In its decision, the BAP, as affirmed by the Ninth Court of Appeals, balanced the Debtor's failure to obtain a stay pending appeal against the rights and effects on third parties, *including Respondent the Ventura Group*, and concluded:

> "As a result of debtor's failure to obtain a stay, the Marina property has been returned to the Ventura Group which has invested money in repairing and re-leasing the Marina to third parties. As the rights of third parties have intervened, we DISMISS THE PRESENT APPEALS AS MOOT."[5]

Thus, it was the Debtor's failure to obtain a stay of the Order Approving the Compromise and Sale between the Trustee and the Ventura Group that led to the dismissal of these appeals.

CONCLUSION

These appeals were found to be moot by both the Ninth Circuit Court of Appeals and the Bankruptcy Appellate Panel for the Ninth Circuit, and the Petitioner has failed to raise any new issue and/or assert any new authority not otherwise previously considered. Further, Petitioner has failed to show any compelling factor as to why this Court should grant certiorari.

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[5] See BAP Memorandum, page A-13, attached to the Petition For Writ.

WHEREFORE, for the reasons set forth herein, Respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

JULIAN BACH
Counsel of Record
ARTER & HADDEN, LLP
725 S. Figueroa Street, 34th Floor
Los Angeles, CA 90017
(213) 430-3300

Attorneys for Respondent,
Michael S. Kogan, Chapter 7 Trustee

RICHARD I. WIDEMAN
ATTORNEY AT LAW
27 El Paseo
Santa Barbara, CA 93101
(805) 884-9521

Attorneys for Respondents,
Ventura Group, LLC; John Scott;
Channel Harbors, Inc.; and
Stearns Wharf/Pacific Harbors
LTD

Dated: August 2, 1999